

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1636

DAVID UNGAR, et al. and JOHN RADER, et al.,  
Petitioners,

v.

DUNKIN' DONUTS OF AMERICA, INC., et al.,  
Respondents.

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

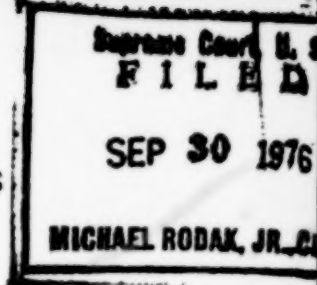
SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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Petitioners respectfully call the Court's attention to a recent decision of the Court of Appeals for the Fifth Circuit which demonstrates a further conflict among the Circuit Courts of Appeals concerning the issues

on which petitioners seek certiorari. In Carpa, Inc. v. Ward Foods, Inc., 1976 - 2 Trade Cases ¶60,995 (5th Cir. July 28, 1976), the Circuit Court of Appeals:

1. Recognized that "coercion" is not a separate element of a §1 tie-in violation (Accord Hill v. A-T-O, Inc., et al., 1976 1 Trade Cases ¶60,873 (2d Cir. May 10, 1976); and

2. Relying on Fortner Enterprises, Inc. v. United States Steel, 394 U.S. 495 (1969), held that the acceptance of a burdensome tie-in by an appreciable number of purchasers "alone suggests the existence" of some special economic power, i.e. coercion.

Carpa was a lawsuit by franchisees against their franchisor in which the plaintiff franchisees established a "patterned practice" of the franchisor's conditioning the license of its trademark on the agreement by the franchisees to purchase or lease food, equipment, supplies, fixtures, furnishings and real estate from the franchisor. The Court of Appeals at p. 69,403 noted that the trial judge had:

...instructed the jury that before they could find a violation of the law the plaintiffs must prove:

(1) that the scheme in question involved two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased;

(2) That the tying product possesses sufficient economic power appreciable to restrain competition in the tied product market; and

(3) That a "not insubstantial" amount of commerce is affected by the arrangement.

This list of elements constituting an illegal tie-in is identical to the elements which the trial judge in the instant case held to be necessary to establish an illegal tie-in. In both instances the alleged element of "coercion" is conspicuous solely by its absence. The Court of Appeals at p. 69,403 affirmed the District Court's charge holding:

We think this charge submitted the issues in intelligible terms and that the Court fell into no error when it declined to propound special interrogatories to the jury on these points individually. The jury was told what it takes to constitute an illegal tie under the Sherman Act and the submitted interrogatory directed the jurors, if they could agree on it, to answer "yes" or "no" as to whether an illegal tying arrangement had, in fact, existed. Viewing the charge as a whole, we think the issue of the existence of an antitrust violation was fairly submitted, that there is no

reason to fear that the jury misunderstood the indispensable requisites. (emphasis added)<sup>1</sup>

This decision of the Fifth Circuit Court of Appeals is in accordance with the decision of the Second Circuit Court of Appeals in Hill v. A-T-O, Inc., et al., 1976 - 1 Trade Cases ¶60-873 (2d Cir. May 10, 1976), and is diametrically opposed to the decision of the Court of Appeals in the instant case.<sup>2</sup>

The evidence in the Carpa case also established that the franchisee had to pay the franchisor "prices substantially higher than market" for the tied goods. In the present case the facts demonstrated that each franchisee had to pay the franchisors

<sup>1</sup>Although the Carpa case, as the instant case, involved a claim by franchisees against their franchisor, the Court of Appeals in Carpa, as did the District Court in the instant case, took specific note of the adverse effect a tie-in has on the competitors of the franchisor. As the District Court noted in the instant case, this adverse effect on the competitors of the franchisor is not in any way dependent on the presence of an additional element of "individual coercion".

<sup>2</sup>See also p. 69,402 of the Carpa decision where the Court of Appeals rejects defendant's contention that, for an illegal tie-in to exist, its trademark must have a "coercive attractiveness".



from \$7,000 to \$20,000 more for the tied equipment packages than it would have to pay on the open market or directly from defendant's own sole supplier. (See p. 13 fn. 10 of Petition.)

Relying on this Court's decision in Fortner v. United States Steel, supra, the Fifth Circuit Court of Appeals in Carpa, supra at p. 69,403 held that:

In the absence of another explanation, such an extensive price differential alone suggests the existence of some special economic power. (emphasis added)

This position is identical to the position taken by the petitioners in this case and accepted by the District Court. The Circuit Court of Appeals in the instant case erroneously reversed and held that the acceptance of a burdensome tie by a substantial number of purchasers can never be used to establish a prima facie case. That position is in conflict with Fortner and Carpa and must not be allowed to stand.

\* \* \*

Respondents attempt to distinguish Hill, supra, is both factually and legally erroneous. Respondents are forced to rely on superficial distinctions with no difference. The fact is that the District Court in the Hill case was faced with a contention identical to the one made by the defendants and adopted by the Court of Appeals in this case, i.e. that in order to establish an illegal tie-in a plaintiff must prove the element of "actual coercion". As in the instant

case, the plaintiffs in the Hill case sought to prove a company-wide policy of tie-ins. (See pp. 2-3 of Petitioners' Reply Brief.) However, unlike the Court of Appeals in this case, the Court of Appeals in the Hill case specifically held that allegations and proof of "actual coercion" were not necessary since:

\* \* \*

An unremitting policy of tie-in, if accompanied by sufficient market power in the tying product to appreciably restrain competition in the market for the tied product constitutes the requisite coercion under Capital Temporaries, given foreclosure of a not insubstantial volume of interstate commerce. See, e.g., Fortner v. United States Steel Corp., supra; Northern Pacific Railway Co. v. United States, supra. (Carpa at p. 68,825)

The language of the Court of Appeals in the Second Circuit, cited above, is virtually identical to the language of the District Court in the instant case, and merely restates that when traditional elements are present, the "requisite coercion" is established.

Thus, respondent's statement that: "There is plainly no conflict between Hill and the decision below." (Respondents' Supplemental Memorandum, p. 3), cannot stand up to scrutiny. A recent class

action decision in Milonas, et al. v. Amerada Hess Corp., United States District Court for the Southern District of New York, 73 Civ. 4263 (JMC) (August 19, 1976) expressly finds a conflict between Hill and the case at bar. Milonas involved an allegation that defendant, an oil company, illegally tied the defendant's trade name to various other items involved in the operation of a gasoline station. The defendant in Milonas asserted that Ungar v. Dunkin' Donuts of America, Inc., 513 F.2d 1211 (3d Cir. 1976) precluded class certification because of the "individual coercion" argument. However, the court in Milonas rejected defendant's argument and held that the tying issue could be certified as a class relying on Hill:

Whatever Ungar's implications suggest for the case at bar, a recent decision in this circuit [Hill] indicates that it [Ungar] is less than compelling authority. (Slip Op. p. 8)

The court in Milonas then went on to quote the "unremitting policy" language of Hill noted supra. Then the court in Milonas stated:

Given this statement of the law [Hill] the following questions must be determined in this lawsuit on the issue of coercion:

- (1) Does Hess have an 'unremitting policy of tie' in?
- (2) Does Hess have sufficient market power in the tying product of appreciably restrain competition in the market for the tied product? The Court finds that these questions are common to the class members and

will not require different proof for each member. (Slip Op. p. 9)

The decision of the Fifth Circuit Court of Appeals in Carpa supports the decision of the Second Circuit Court of Appeals in Hill as do the prior decision of this Court. The decision of the Court of Appeals in the instant case is contrary to the decisions of this Court and is contrary to the decisions of the Second Circuit Court of Appeals in Hill, and the Fifth Circuit Court of Appeals in Carpa. Therefore, this Court should grant this Petition and issue a Writ of Certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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